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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 359

HUGH A. BOWEN,

Petitioner,

vs.

JAMES A. JOHNSON, WARDEN.

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT.**

**MEMORANDUM FOR PETITIONER UPON
ARGUMENT.**

SETH W. RICHARDSON,
Attorney for Petitioner.

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I.

The Act of November 19, 1890, found at page 40 of the Government's brief reserved full criminal jurisdiction over persons and citizens in the said ceded territory "as over other persons and citizens in this state".

The policy indicated by this statute with respect to the retention of criminal jurisdiction was continued in later

legislation affecting roads and highways adjacent to the park as follows:

- Laws of Georgia (1893) page 110;
- Laws of Georgia (1895) page 77;
- Laws of Georgia (1901) pages 85-87;
- Laws of Georgia (1902) page 110.

There is, therefore, everywhere apparent a purpose on the part of the State to retain its criminal jurisdiction over this particular park.

In the Georgia Code (1933), Sections 15-302, effective January 1, 1935, "purports", says the Government's brief (p. 32), to reenact certain restricted jurisdictional provisions contained in Acts before the 1927 statute", but the Government asserts that this section is without application, because the crime was committed in 1930. The important point is that this 1933 reenactment shows the continuing purpose of the State of Georgia to retain its criminal jurisdiction, regardless of the 1927 statute.

Then follows the Act of February 16, 1935, in which the State ceded jurisdiction of land for national monuments in which the reservation of criminal jurisdiction to the State was almost identical with the language of the 1890 statute.

Thereafter came the Act of March 8, 1935, covering a cession of jurisdiction over certain swamp lands, the State retaining criminal jurisdiction "as if this Act had not been passed".

It is apparent, therefore, that the legislative purpose to retain criminal jurisdiction has been consistent ever since the passage of the 1890 statute.

In addition to the foregoing consistent policy on the part of the State of Georgia, the following reasons why the 1927 Act may not appropriately be construed as effectuating an

implied repeal of all the legislation above referred to, are as follows:

1. No reference whatever is made to the special acts affecting this particular park.

2. The Act contains no repealing clause.

3. It is a general Act without specific application.

4. We have been able to find no notice to the United States of the passage of the Act, and no acceptance of the exclusive jurisdiction therein referred to.

5. A personal examination of the House and Senate Journals discloses no assigned reason for the Act, or explanation as to what particular acquisitions it refers. (See Exhibit 1.)

6. The language used in the Act is unusual and highly restricted. It applies to "custom houses, post offices, arsenals, other public buildings whatever, or for any other purposes of government". The only possible application the Act might have to this park would be under the phrase "other purposes of government". Under the rule of *ejusdem generis*, such purposes ought to reflect purposes similar to the preceding acquisitions, such as custom houses, post offices, etc. .

7. Repeals by implication are not favored and will not be sustained unless there is an inability to reconcile the two conflicting statutes. No such difficulty appears here because of the nature of objects recited in the 1927 Act as compared with an acquisition such as a national park.

8. Subsequent general statute will not impliedly repeal an earlier specific statute. (See Federal Statutes Ann., Vol. 1, Section 142, citing *Rodgers v. United States*, 185 U. S. 83; *Petri v. Creelman Lumber Co.*, 199 U. S. 487.) It

is thus insisted that the provisions of the 1890 statute survives the passage of the 1927 statute, and that the statute of 1890 is controlling as to the jurisdiction of the United States over the park area.

This situation seems to reflect the actual administrative situation in the field, as indicated by the letter of the Solicitor General of the Rome District. (See Exhibit 2.)

There is also what seems to be a tacit acceptance of the present validity of the 1890 statute in connection with the proceedings in the Circuit Court of Appeals below, since that court made no attempt to dispose of the point in question by finding that the 1927 statute conferred exclusive jurisdiction on the United States, although the record discloses (fol. 77) that copies of the applicable Georgia and Federal Statutes were to be delivered to the Court.

II.

Asserting for petitioner that the United States must be found, as a matter of law, to be without exclusive jurisdiction over the park area, the Government contends that since the point only goes to the jurisdiction of the United States, it is defensive, and therefore is conclusively determined by the judgment of conviction. (Citing *Louie v. United States*, 254 U. S. 548; *Pothier v. Rodman*, 261 U. S. 307; and *Rodman v. Pothier*, 264 U. S. 399.)

In each of these cases proceedings had not terminated in the courts below, and a forum then existed in which the question of the jurisdiction of the United States could be litigated. Moreover, the question of jurisdiction in those cases depended upon conflicting facts and not upon the purely legal question.

In *Walsh v. Archer*, 73 F. (2d) 197, the issue of fact controlling jurisdiction was whether the crime was committed at sea or in the harbor. Most of the other cases cited by the Government are with respect to Indians who claimed to

be outside the jurisdiction of the court because of the issuance of patents—a situation which the court had definitely held was not sufficient to oust the United States of a then *status quo* of exclusive jurisdiction.

Undoubtedly the general rule is in the individual case that the court will not review upon *habeas corpus* matters determined or determinable by the trial court. But, as indicated, that rule has been largely established in cases where the defendant still had an opportunity to present the point in the lower court.

In practically all of these cases, the court indicates that the general rule thus referred to is inapplicable where exceptional circumstances exist, impelling the court in the interest of public justice to accept jurisdiction on *habeas corpus*.

Thus in *United States v. Heff*, 197 U. S. 488, the Court discharged a prisoner on *habeas corpus*, where the court found that the United States was without jurisdiction of the person and subject matter of the offense. This decision was made, the Court said, in *United States v. Lincoln*, 202 U. S. 178, because exceptional circumstances existed which took the case out of the ordinary rule. The exceptions noted by the Court were as follows:

1. That both the State and the United States claimed jurisdiction over the claim. This exact condition exists in the case at bar, since the defendant was first arrested by the State charged with this specific offense. (Petition for Certiorari, p. 2.)

2. That, in the *Heff* case, since the Circuit Court of Appeals below had decided the point against petitioner's contention in another case, it would be useless to require the petitioner to present the point to that court. A more extreme condition exists here, because here, due to lapse of

time, the Circuit Court of Appeals would have no power whatever to consider the point at this time.

3. That in the *Heff* case, that question of jurisdiction of the Nation and the States concerning large numbers of Indians raised a question of public interest. The same precise condition exists here since due to the multitude of non-resident citizens thronging through such a national park, the question of the controlling jurisdiction over crimes becomes a matter of even greater public significance.

Consequently since in the *Heff* case the Court permitted the consideration of the question of the jurisdiction of the United States in a *habeas corpus* proceeding, that case, since it has not been overruled, is an authority supporting petitioner's demand here.

III.

It is not fair to say that the defendant intentionally stood aside and permitted his right of appeal to fail, and therefore should not, equitably, be permitted to again raise the point here.

The defendant was without funds, was kept in jail for more than two years prior to his trial, was not given a copy of the indictment and the names of the witnesses, as provided in the Federal Statute, which was mandatory (*Logan v. U. S.*, 144 U. S. 263) and when he requested that the record be reported, was advised that since he was a pauper, the Government should not be put to the expense of a report (R. 5). Thereafter, he alleges, in his petition for certiorari that his attorney unwarrantably failed to appeal (Page 4, Pet. Cert.). Petitioner's persistent efforts to get the matter thereafter reviewed on *habeas corpus* indicates that his failure to take an appeal in his case was not his fault, and that he at least should not be blamed because no appeal was perfected.

IV.

The record in this case is very deficient. The District Court apparently made no particular effort to develop the facts. If the Court, therefore, should feel that a full development of the facts would be advisable, in order to permit the Court to determine whether this proceeding will be viewed as an exception, then under the rule in the case of *Johnson v. Zerbst*, decided at the last term, the Court has power to remand the case to the District Court in order that the record may be properly made. On the other hand, if the Court, in view of the public importance of the decision, accepts petitioner's contention that the United States did not have exclusive jurisdiction over the park area, then it would seem that without further examination of the facts below, the writ should issue, and the petitioner should be appropriately turned over to the authorities of the State of Georgia for a proper disposition of the case against petitioner under the laws of Georgia.

Respectfully,

SETH W. RICHARDSON,
Attorney for Petitioner.

EXHIBIT No. 1.**Memorandum.***History of the Act of 1927.*

Senate Bill 191 was introduced July 27, 1927, by Senator Myrick. It was identified as "a bill to provide for acquisition of lands in the state of Georgia by the United States Government".

The bill was reported favorably, without comment, on July 28th, under the same title designation, and on August 8th, was unanimously passed.

On August 10th, the bill was introduced in the House under the same title designation. It was favorably reported without comment on August 17th, and on August 20th, was passed unanimously.

EXHIBIT No. 2.

November 4, 1938.

MR. SETH W. RICHARDSON,
815 15th Street,
Washington, D. C.

DEAR SIR:

Your letter of the 31st ultimo, addressed to the Attorney General of the State of Georgia, has been referred to the writer as Solicitor General of the Rome Judicial Circuit, the Circuit in which the Chickamauga-Chattanooga National Military Park is located. This National Military Park is also located in the Cherokee Judicial Circuit of the State of Georgia.

Upon making reference to your letter to the Attorney General, beg to advise that there is an Act of the General Assembly of the State of Georgia ceding to the United States of America criminal jurisdiction over persons within the park area, and all felony and misdemeanor cases committed upon this Military Reservation. However, in the past years,

since this Act of the General Assembly, as well as National legislation, which you will find in the United States Code Annotated in Volume 16 of the latest edition, many misdemeanor and felony cases that the sheriffs of Catoosa and Walker Counties apprehend on the Military Reservation have been tried in the courts of the State of Georgia. There have been two murder cases that were committed in the park that were tried in the State courts. In the last two years there have been cases of murder which were tried in the United States District Court in Rome that were committed on the same Reservation. It seems that no one has ever raised the point as to the question of jurisdiction of these cases, preferring to be tried in the court which preferred the indictment in each case.

I am advised that the usual practice, when a person is apprehended for driving an automobile while under the influence of intoxicating liquors, is to turn the person over by the Military authorities to the State authorities, rather than have the matter handled in the Federal Court. This practice has been in force for many years, while, as a matter of strict law, all violations are subject to being tried in the United States District Court where civilians have committed the offenses.

Since my connection as prosecuting attorney of this Circuit, it has been the policy, or rather the desire of the persons in charge of this Military Reservation to refer practically every criminal violation on the part of civilians over to the State Courts.

Trusting that this information has answered your inquiry, and, if I can be of any further service, I will be delighted to do so, I am,

Yours very truly,

(Sgd.)

J. RALPH ROSSETT,
Solicitor General of Rome Circuit.

(9526)